

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

From: Natalie Bocanegra, Commission Counsel
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Subject: Adoption Discussion of Proposed Regulatory Action to Address General Plan Decisions: Amendment of Reg. 18704.2 (Direct/Indirect Involvement)

Date: July 14, 2004

I. EXECUTIVE SUMMARY

At its May 2004 meeting, the Commission heard pre-notice discussion regarding whether it is desirable to adopt special regulatory provisions to address general plan issues, and specifically, whether amendments should be made to Step 4 (direct/indirect involvement) or Step 7 (“public generally” exception) of the Commission’s conflict-of-interest analysis. The Commission rejected Step 7 (“public generally” exception) language and decided that the Step 4 (direct/indirect involvement) language should be presented to the Commission for adoption at its August 2004 meeting. At this direction, staff now presents a proposed amendment to regulation 18704.2 for adoption.¹ (Attachment 1.)

Decision Point: Should regulation 18704.2 be amended to address general plan issues?

Proposed regulatory action: Amend regulation 18704.2 to specify that the involvement of real property in certain broad, policy-making general plan decisions is deemed **indirect** so, as a result, it is presumed that the effect on real property indirectly involved in these types of decisions is **not material**. The rationale for this approach is that where the decision is very general and does not implement specific actions, real property will be indirectly involved.

Staff Recommendation: Staff concludes that it is desirable to adopt regulatory language which clarifies application of the conflict-of-interest rules to broad, policy-making general plan decisions. The staff supports the

¹ All citations herein are to the Government Code sections 81000 – 91014 unless otherwise noted. All regulatory citations are to Commission regulations at Title 2, sections 18109 – 18997, of the California Code of Regulations.

proposed amendment to regulation 18704.2. This approach is beneficial because it is consistent with other direct/indirect involvement rules. In addition, it would assist public officials when determining whether real property is indirectly involved in these types of decisions.

II. BACKGROUND

A. Prior Commission Action

This regulatory project was undertaken to address specific concerns raised by the County of San Diego regarding application of the Commission's conflict-of-interest analysis (Attachment 2) to general plan decisions. Because a general plan governs the direction of future land use in a city or county, members of the regulated community have proposed that special rules be developed for general plan decisions to increase participation by disqualified public officials. Following a series of interested persons' meetings,² draft regulatory language was presented to the Commission at its June 2003 meeting. At that time, the Commission rejected a regulatory proposal presented by the County of San Diego, but directed staff to develop regulatory proposals at Step 4 (direct/indirect involvement), Step 5 (materiality standard), Step 6 (reasonable foreseeability), and Step 7 ("public generally" exception) of the conflict-of-interest analysis and examine related issues.

At its September 2003 meeting, the Commission adopted regulation 18709 to address some of the general plan concerns. This regulation allows, in limited circumstances, an official to participate in certain decisions which may be "related" to a decision in which the official has a conflict of interest, provided that the decisions can be segmented. Subsequent to this adoption, staff held an additional interested persons' meeting in January 2004 and continued refinement of draft regulatory language for Step 4 through Step 7.

At its March 2004 meeting, the Commission further considered whether it is desirable to adopt special regulatory provisions to address general plan issues. The Commission discussed Step 4 through Step 7 and considered which of these steps should be amended to address the general plan issues. Based on this discussion, the Commission directed staff to continue development of approaches for Step 4 (direct/indirect involvement) and Step 7 ("public generally" exception).

Regulatory approaches for Step 4 (direct/indirect involvement) and Step 7 ("public generally" exception) were presented to the Commission at its May 2004 meeting. The Commission heard public testimony³ on the proposed language and ultimately decided that Step 4 (direct/indirect involvement) language should be brought back to the Commission for adoption.

² These meetings took place in July 2002, September 2002, and February 2003.

³ In addition, comment letters on this item were submitted by John J. Sansone (Office of County Counsel, County of San Diego), Michael D. Martello (Office of the City Attorney, City of Mountain View), and Charlene Ayers (resident of San Diego County).

B. General Plan

As discussed in staff's memorandum to the Commission entitled, "*Overview of Public Generally Regulations as Applied to General Plan Decisions*," May 23, 2003, California law requires each city and county to adopt a general plan "for the physical development of the county or city, and of any land outside its boundaries which...bears relation to its planning." (Government Code section 65300.)⁴

A general plan has several mandatory elements which consist of the following: land use, circulation, housing, conservation, open space, noise, and safety. (Government Code section 65302.) All of these elements must be consistent with one another. Furthermore, all developmental decisions must be consistent with the general plan. The land use element is perhaps the broadest in scope and is often perceived as being the most representative of the general plan. General plans may be amended by private or public initiative. Some general plan amendments facially apply to the entire jurisdiction, but in practice affect only a discrete property or area in the jurisdiction.⁵

C. Step 4 - Direct/Indirect Involvement (Real Property) - Current Commission Rules and Advice

The most common economic interest prompting requests for advice regarding general plan decisions is a public official's economic interest in his or her principal residence. (See staff memorandum, "*Overview*," *supra*.) At Step 4, an official must determine whether his or her interest in real property is directly or indirectly involved in a general plan decision. This determination is necessary in identifying the appropriate materiality standard applicable to real property (Step 5) and usually has a significant impact on an official's obligation to disqualify from a decision because, where real property is directly involved in a decision, the financial effect of the decision is presumed to be material.⁶ (Regulation 18705.2(a)(1).)

Alternatively, if such property is indirectly involved in a decision, then the financial effect of the decision is presumed *not* to be material. Notwithstanding this presumption, there still may be proof that the official has a conflict of interest due to the nature of the general plan or land use element decision. (See regulation 18705.2(b)(1).)

⁴ See staff memorandum, "*Overview*," *supra*, for a more detailed discussion of general plan laws and Commission staff advice.

⁵ For example, a proposed circulation element may be applicable to an entire jurisdiction but the element proposes to construct a traffic median on a particular road within the city, or a general plan amendment may decrease the number of housing units that could be added to identifiable neighborhoods.

⁶ An interest in real property includes leaseholds. There are separate sets of factors applicable to leaseholds which may rebut the presumptions with respect to materiality. These factors include an effect on: the termination date of the lease; the amount of rent paid by the lessee; the value of the lessee's right to sublease the real property; the legally allowable use or the current use of the real property by the lessee; the use or enjoyment of the leased real property by the lessee. (Regulation 18705.2(a)(2).)

In general, Commission advice as to whether real property is directly or indirectly involved in a general plan decision varies based on the details of the decision. (See staff memorandum, “*Overview*,” *supra*.)

III. DISCUSSION OF PROPOSED REGULATORY ACTION: AMENDMENT OF REGULATION 18704.2

A. Overview

Real property tends to be the most common trigger for a conflict of interest in general plan decisions. (Staff memorandum, “*Overview*,” *supra*.) In general, real property located within a general plan area is frequently considered “directly involved” and, therefore, presumed to be materially affected by the decision. As a result, the regulatory path to the conclusion that a public official is disqualified begins at the point where the level of involvement (Step 4) is determined. As such, staff believes that clarification at Step 4 is clearly desirable.

This approach maintains the current rebuttable presumption analysis applicable to real property interests, thereby offering an elasticity that fits to any set of facts. While it does not provide a conclusive rule or a safe harbor, it gives an official the benefit of a presumption of non-materiality when a financial interest arises from real property.

B. Proposed Regulatory Language

The language presented in the proposed amendment to regulation 18704.2 applies to decisions which identify “planning objectives” or are “otherwise exclusively one of policy.” The purpose of this language is to sift out general plan decisions which are being made in order to enable developers, businesses or other interests to generally execute their economic agenda within the community. As a result, the eligibility criteria are designed to capture general plan decisions which are generic or advisory, while excluding general plan decisions which are executory and implement policy.

Finally, the proposed criteria for general plan decisions were developed and described by terms rooted in land use and development law, cross-referencing specific sections of Title 7 of the Government Code (Planning and Zoning). These terms are used in the proposed language for regulation 18704.2.

1. Proposed Amendment to Regulation 18704.2

The proposed amendment to regulation 18704.2 specifies when real property is indirectly involved in certain types of general plan decisions. (Attachment 1.) The rationale for this language is that where the decision is very general and does not implement specific actions, real property would be indirectly involved.

Deeming real property to be *indirectly* involved in a certain type of general plan decision can be helpful to increase participation by officials with broad, policy-making general plan decisions before them since a decision indirectly involving real property is presumed *not* to have a material financial effect on the official under Step 5 (materiality standard).

a. Provisions

In particular, proposed **subdivision (b)(3)** of regulation 18704.2 would provide that real property is **indirectly involved** in a decision if the decision:

- Solely concerns the adoption or amendment of a general plan;
- Only identifies planning objectives or is otherwise exclusively a policy decision;
- Was not initiated by the public official, by a person that is an economic interest of the public official, or by a person representing either the public official or an economic interest of the public official;
- Is preliminary in nature, in that a further decision or decisions by the official's agency is necessary prior to the implementation of the planning or policy objectives. (Examples of "further decisions" include but are not limited to permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent);
- Does not concern an identifiable parcel or parcels or development project; and
- Does not concern the agency's prior, concurrent or subsequent approval of, or change to, any of the examples specified above.

This language also contains a provision permitting this rule to be used if a parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency's jurisdiction and economic interests of the official are not singled out. The purpose of this provision is to allow public officials to view a general map of an area under discussion, so long as the map itself does not serve as a vehicle for an official to make a decision regarding action on a particular parcel.

In addition to these provisions, proposed **subdivision (c)** of regulation 18704.2 would provide definitions as follows:

“(c) Definitions - General Plans. The definitions below apply to this regulation:

(1) A decision ‘solely concerns the adoption or amendment of a general plan’ when the decision, in the manner described in Government Code sections 65301 and 65301.5, grants approval of, substitutes for, or modifies any component of, a general plan, including elements, a statement of development policies, maps, diagrams, and texts, or any other component setting forth objectives, principles, standards, and plan proposals, as described in Government Code sections 65302 and 65303.

(2) ‘General plan’ means ‘general plan’ as used in Government Code, Title 7 (Planning and Zoning), Division 1 (Local Planning), Article 5, sections 65300, et seq.

(3) ‘Specific plan or its equivalent’ means a ‘specific plan’ or any equivalent plan adopted by the jurisdiction to meet the purposes described in Government Code, Title 7 (Planning and Zoning), Division 1 (Local Planning), Article 8, sections 65450, et seq.”

b. Pros & Cons

As noted above, the proposed amendment would result in real property being considered indirectly involved in certain general plan decisions. Currently, it is not always clear whether real property is directly or indirectly involved in a general plan decision. (See staff memorandum, “*Overview*,” *supra*.) This approach is also beneficial because it is consistent with other direct/indirect involvement rules. Currently, under regulation 18704.2(b), there are other decisions which are already considered indirectly involved, simply by virtue of the type of decisions they are (e.g., amendments to existing zoning ordinances or other land use regulations, and repairs, replacements, or maintenance of streets, etc.).

This amendment would offer guidance to public officials in determining the type of involvement of the real property, and, in turn, the applicable materiality standard (or presumption). In addition, this language would resolve any apparent inconsistencies in past advice letters dealing with general plan decisions.

It should be noted that the effect of this language would be limited to the extent that the presumption is not conclusive but rather is rebuttable. Several interested persons have commented that circumstances surrounding general plan decisions will frequently rebut a presumption of non-materiality (under Step 5 of the conflict-of-interest analysis) since the decisions are often meant to alter existing land use. Such circumstances include the development or income producing potential of real property, the use of the property, and the character of the neighborhood. (Regulation 18705.2(b)(1)(A)-(C).) Therefore, according to these persons, the proposed Step 4 language may not go far enough to allow participation by public officials in general plan decisions.

However, staff believes that if the decision before the official is truly a broad, policy-setting decision not linked to any specific executory action, the presumption of non-materiality should rarely be rebutted. This is the case because the materiality standard for indirectly involved real property only provides that the presumption may be rebutted by:

“...proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest....”
(Regulation 18705.2(b)(1).)

The current rules do not allow for the presumption to be rebutted on principle, but rather require facts which demonstrate reasonable foreseeability.⁷ Where such facts exist, it is not appropriate to allow participation by the official. The proposed language for regulation 18704.2 is not meant to apply to such situations.

Staff Recommendation: The staff supports the proposed amendment to regulation 18704.2 for the reasons noted above. Staff also believes that it may be prudent to adopt these changes now to see if they resolve the issues raised by the regulated public. The Commission may always consider new changes to the “public generally” exception if the regulation 18704.2 changes do not resolve the issues.

Attachments:

Regulation 18704.2 – Attachment 1

⁷ Staff presented language at the March 2004 Commission meeting attempting to further define when “reasonable foreseeability” exists in general plan decisions. However, the Commission found this approach undesirable because it could result in a legal fiction which might not incorporate pertinent facts establishing that, in a particular situation, it actually *is* reasonably foreseeable that a material financial effect would occur.